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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 469.

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

Questions Presented.

The two questions presented by petitioner Incres assume a critical fact which is not true, namely, that its two vessels come only "temporarily into American waters." This is in sharp contradiction to Incres' acknowledgment on page 21 of its brief to the New York Court of Appeals that the vessels are engaged in "substantial continuing American foreign commerce." No other description of the vessels' operations would be accurate. They are used exclusively in regular shuttle service between New York and Caribbean

ports with all voyages starting and ending in New York. The totality of Ineres' business originates in the port of New York.

It is also incorrect for Ineres to state in the questions presented that the facts are not in dispute.

Statement.

Parties.

Petitioner.

Nominally incorporated in Liberia, Ineres operates two luxury ocean liners, SS *Nassau* and MV *Victoria*, in the Caribbean cruise trade. Ineres' main operating office is at 39 Broadway, New York City, from where it manages its business in its own name and in the name of a New York corporation which it controls—Ineres Lines Agency, Inc. (herein "Ineres Agency") (R. 52, 266, 274).

Respondents.

IMWU is an American labor union formed to organize merchant seamen employed aboard "runaway" or "flag of convenience" ships, i.e., foreign flag vessels which do not operate in the trade of the flag nation and are owned by absentee interests which have no substantial connection with the flag nation (R. 190, 195, 198-200, 266, 274-275; Defs. Ex. E—Preamble, Article II).[1] Because favored countries for convenience registry are Panama, Liberia and Honduras, the word "Panlibhon" has been coined to denote convenience ships the world over (R. 20, 193).

Respondent Shannon J. Wall is the Executive Director of IMWU (R. 190).

The other respondents have not been served and do not appear.

---

[1] An unprinted exhibit, a copy of which has been filed with the Court (R. 190, 283).

Pleadings.

Complaint.

The complaint alleges that on May 13, 1960, IMWU began to picket the *Nassau* with signs demanding recognition (R. 8). The Italian crewmembers who manned the vessel stopped working, "some in the hope of higher wages . . . others in fear of reprisal," and longshoremen stopped loading (R. 8).

These concerted activities are claimed to be unlawful because, *inter alia*:

(a) IMWU seeks to compel recognition although it "does not lawfully represent a majority of the crew," and it has made Ineres the "innocent victim of a jurisdictional dispute between rival unions" (R. 9).

(b) IMWU cannot be certified as bargaining agent "by either the National Labor Relations Board or the New York State Labor Relations Board" because neither state nor federal labor relations statutes "apply to foreign ships with foreign crews in any way" (R. 9).

(c) IMWU is interfering with the "internal management and relations of a foreign vessel" (R. 9).

Sweeping injunctive relief is prayed for, restraining IMWU from "interfering in any way with the operation and management" of the vessels and picketing "for any purpose" (R. 11).

Amended Answer.

The amended answer (R. 29-35) denies material allegations of the complaint although it admits that IMWU picketed and a majority of crewmembers voluntarily struck the vessels (R. 30, 32).

Five affirmative defenses are set forth alleging that the NLRB has exclusive jurisdiction over the controversy (R. 30-34); that IMWU's peaceful actions are protected by the constitutions of the United States and the State of New York, and by New York common law (R. 34); and that the labor dispute involved is not enjoinable under New York's "Little" Norris-LaGuardia Act (N. Y. CPA §876a) (R. 34).

Examining the Facts.

Incres' Ruse.

Incres alleged in its complaint and supporting affidavits purported facts subsequently proved untrue. They are revealing of the aura of foreignness that Incres has sought to cloak itself in from the outset of this litigation. Included among them are:

—Incres' principal office is in Monrovia and it has no office or place of business in the United States (R. 5-6, 12). The truth is that Incres has no office in Monrovia but maintains one in New York where its activities are centered (R. 52, 266, 274). At the trial, Incres' President and its counsel quickly dropped the fiction of an office in Monrovia and stated that Incres' principal office was in London (R. 36, 51). They carefully refrained, however, from any description of the dimensions of the alleged London office or what was done there. The Appellate Division of the New York Supreme Court concluded that the "de facto" home port of the vessels was Genoa (R. 269), and Incres now says that it "accepts" that finding despite the fact that the vessels' Liberian certificates of registry state that Monrovia is the home port (Plt. Exs. 1, 2; R. 37, 39, 234-235, 238-239).

—Crewmembers belong to an Italian union, and work under a union "approved" contract, and no dispute with them exists (R. 7, 13-14). The truth is, as conceded by the Captain of the *Nassau*, that Incres seamen belong to no union, are paid substantially less than Italian union scale and have serious differences with Incres (R. 152-154, 163-164, 156-158).

—Incres is the innocent victim of a jurisdictional dispute between an American and Italian union (R. 15). The truth is that no inter-union rivalry exists (R. 24, 158). IMWU's right to organize Incres' seamen is unchallenged by any union (R. 25, 193, 213).

Incres' New York Office.

Contrary to the fabricated image of a company with headquarters in Monrovia caught in an inter-continental union squeeze, the undeniable truth is that Incres' main operating office is located at 39 Broadway, from which the extensive activities involved in operating two large ocean liners in weekly 400-passenger cruises are largely controlled (R. 52-58).

Incres nominally "shares" this office with its namesake and alter ego, Incres Agency (R. 52, 54, 55), but the business of the line is conducted as a single integrated operation (R. 55). Incres and Incres Agency use a common letterhead under the heading "Incres Line" (R. 54, 55, 243); and that is the only name by which the master of the *Victoria* knew the company (R. 113).

Vincenzo Berlingeri, Incres' President and member of its Board of Directors (R. 59-60), resides in New York (R. 58) and maintains his office at 39 Broadway from which he transacts the business of the line (R. 52). He is also an officer and director of Incres Agency (R. 59-60). The

nominal President of Incres Agency is one Max J. Ransden Wolfson (R. 12), who considers Berlingeri his superior (R. 57-58). A striking demonstration of the unity of interest and relationship between Incres and Incres Agency is apparent in Wolfson's verification of the complaint and moving affidavit initiating this case, even though Wolfson claims no official connection with Incres (R. 12, 15).

From 39 Broadway, Berlingeri and Wolfson handle or oversee passenger bookings (R. 52-53), provisioning (R. 52-53, 55), arrangements for arrival and departure (R. 52-53, 55), inspections (R. 53), fueling (R. 57-58, 172, 175), advertising (R. 55), repairs (R. 57), cargo (R. 172) and other husbandry details (R. 172-175). Consultation between Berlingeri and Wolfson is commonplace (R. 56-8, 59).

A technical inspector employed by Incres to oversee certain extensive repairs on the *Victoria* maintains his desk at 39 Broadway (R. 81-82). Consular communications concerning documentation of the vessels and officers' licenses are also addressed to 39 Broadway (R. 43-44).

Labor relations matters are similarly dealt with from 39 Broadway (R. 53, 65, 115, 149, 150, 169), including discipline (R. 65-66), requests for promotion, and personal problems of crewmembers (R. 53). The masters of the *Nassau* and *Victoria* make weekly written reports to 39 Broadway which cover details of the voyage, including disciplinary problems (R. 65-66, 114). They also speak personally on these and all other phases of operations with either Berlingeri or Wolfson, depending on whom they see first (R. 65-66, 115, 169, 171). When crew replacements are required, they are either flown or transported to New York (R. 56). When IMWU began to organize the *Nassau* and *Victoria*, Berlingeri and Wolfson dealt with the union in New York (R. 203-207, 211).

Confronted with the palpable facts of its New York activities, Incres has sought to cling to its claim that it is a wholly foreign corporation by verbally disassociating itself from its domestic agency while at the same time attributing to the agency the manifold functions entailed in operating the steamship line (R. 52-53).

Corporate semantics, however, cannot conceal that Incres and its agency, cemented together by interlocking officers and directors (R. 59-60), conduct a single integrated operation in which the activities of one are indistinguishable from the activities of the other. While the integral quality of the relationship is fully established in the record, complete inquiry along this line was regrettably curtailed by Incres' objections, which we believe were erroneously sustained by the trial court (e.g., R. 54, 66, 82-83).

Incres Engages in United States Commerce Financed by American Capital.

The management and control of its affairs from New York are only one aspect of Incres' significant American contacts. Most important of all, Incres' extensive shipping operations are conducted almost entirely in United States commerce. The *Nassau* and *Victoria* sail exclusively in the Caribbean cruise trade with each voyage beginning and ending in New York (R. 64, 154). Each vessel completes approximately 30 weekly voyages in a cruise season (R. 64). The passengers are almost all Americans (R. 64). Realistically, the vessels are floating hotels for American vacationists from the New York area. The vessels have never been in Liberian or English waters (R. 64).

In addition to being entrenched in American commerce, the vessels are American financed. The trial disclosed

that a fleet mortgage for $4,000,000 covering the *Nassau* and *Victoria* is held by the Bank of America (R. 48). Because of the pressures of a forthwith trial, IMWU was unable to secure a copy of the mortgage in time to offer it in evidence. The mortgage, however, is a public document recorded and available for inspection in New York City in the office of the Deputy Commissioner of Maritime Affairs of the Republic of Liberia for the Port of New York, and judicial notice should be taken of its contents. The mortgage (Preamble, Par. 2, p. 1) confirms that Incres is engaged in United States commerce, describing its operations as:

> "Shipowner is engaged in the operation of the vessel S/S. '*Nassau*' between the City of New York and Nassau, and has contracted with a European shipyard for the conversion of the vessel M/S. '*Victoria*' into a cruise type of passenger vessel so that it may operate the same in lieu of the S/S. '*Nassau*'."

The mortgage also confirms the intimacy of the relationship between Incres and Incres Agency. Among other things, in a "Loan and Credit Agreement" which is part of the mortgage, Incres Agency undertakes to act as guarantor for repayment of principal and interest on the mortgage. The same person on the same day, one R. F. Barnett, executed the agreement and mortgage for Incres and Incres Agency.

A recorded amendment to the mortgage, dated September 11, 1959, is executed by Berlingeri, for both Incres and Incres Agency.

IMWU—Answer of American Maritime Unions to Flag-of-Convenience Threat.

IMWU was formed in 1959 for a two-fold purpose:

1. To organize and improve job conditions of seamen on flag of convenience vessels (R. 195; Defs. Ex. E-Preamble, R. 283).

2. By such efforts to reduce the depressive effects of their low wages and inferior conditions on the superior wages and conditions of American union seamen (R. 194-196, 216-218).

Since World War II, job opportunities of American seamen have been drastically curtailed and their power in collective bargaining weakened by the vast growth of flag of convenience fleets (R. 194). Available statistics show a continuous decline in employment on America flag ships from 158,860 in 1945 to 49,281 in 1958 (Note, *Panlibhon Registration of American Owned Merchant Ships*, 60 Columbia L. R. 711, 712, n. 13 (1960); *Hearings on Vessel Transfer, Trade-In, etc., before Committee on Merchant Marine*, at p. 715, 85th Cong., 1st Sess. (1957)), and a corresponding increase in tonnage of Panlibhon vessels from 1,745,048 gross tons in 1950 to 6,388,000 gross tons ten years later (Note, *The Flag-of-Convenience Fleet*, 69 Yale L. J. 498, 499, nn. 6, 8 (1960)). Savings in labor costs and taxes are generally conceded to be the motivating factors for the growth in Panlibhon fleets (Note, *op. cit.*, 60 Col. L. R. at 715). This Court took cognizance of the phenomenon in *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953):

> "... it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries."

The lure of foreign registration is reflected in the percentage decline of United States' oceanborne foreign trade carried in American bottoms from 49.2% in 1951 to 10.5% in 1960 (*Analysis of Participation of U. S. and Foreign Flag Ships in Oceanborne Foreign Trade of United States, 1937, 1948, 1951-60;* U. S. Dept. of Commerce, Maritime Administration, 1962 at pp. 6-7). In contrast, in 1960 almost 40% of our foreign trade was transported in ships of Liberian and Panamanian registry (*Ibid.*, at p. 4).

The wages of American union seamen employed in the Caribbean cruise trade on American flag vessels are well over three times that of Incres' seamen, and Incres competes directly with these American flag vessels in the Caribbean cruise trade (R. 195-6).

Incres' claim that IMWU seeks to put it out of business is unfounded. IMWU's Executive Director, Wall, testified that the sole objective of the organizing efforts was to raise the wages of Incres seamen because they were competing with American seamen in comparable employment (R. 216-17).

Under sharp cross examination Wall said that it would be to IMWU's advantage if there were no ships but American ships (R. 218). It is a truism of the labor movement that every union would be advantaged if the only employers were high-wage union employers. This in no way reflects upon IMWU's intentions with respect to Incres.

IMWU Organizes *Nassau* and *Victoria*.

IMWU began to organize the crews of the *Nassau* and *Victoria* in late January or early February 1960, with ITF[1] approval (R. 24, 28; 193). Within two months organ-

[1] An international confederation of transport workers' unions from sixty-two nations in the free world (R. 191).

izors succeeded in obtaining pledge cards from a majority of crewmembers (R. 21, 202-203).

At a meeting on April 13, 1960, Berlingeri informed Wall that he was reluctant to negotiate with IMWU because, among other things, he was fearful of the wage and other demands which would be made (R. 22, 204-205, 206-207). On April 29, 1960 IMWU served Incres with a formal written demand for recognition (R. 246).

When it became apparent that Incres would not voluntarily recognize IMWU despite its majority, the union determined to publicize the dispute, and on May 13 commenced to picket the *Nassau* (R. 23, 207). The picketing was at all times peaceful (R. 23, 160-161, 182), and the legends on the picket signs were truthful (R. 160). No more than two or three pickets walked at any one time (R. 160-161), and adequate personnel remained on board the vessels to insure their safety, the union cooperating in this regard (R. 165-166).

On May 16, 1960, IMWU filed unfair labor practice charges against Incres which are still being processed by the NLRB (R. 27, 203).

Summary of Argument.

The judgment of the New York Court of Appeals dismissing the complaint should be affirmed without considering the issue of whether the NLRB has jurisdiction over Incres' domestic cruise business. Board proceedings have been in progress against Incres since 1960 based on IMWU's unfair charges. An extensive investigation of the jurisdictional question has been conducted by the Board, and its decision is awaited. Since the Board has exclusive authority to determine its own jurisdiction "in the first instance," and administrative remedies have not

been exhausted, court review at this intermediate stage is barred. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Even if Board proceedings were not in progress, state as well as federal courts would be without power to adjudicate the dispute because it is "arguably" or "potentially" subject to NLRB regulation. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U. S. 173 (1962); *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245 (1959). *Interlake* and *Garmon* cannot be circumvented by claiming a "threshold" issue, since the Board has primary exclusive competence at the "threshold" also. *Myers* v. *Bethlehem Shipbuilding Corp., supra.*

Benz v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958) does not exempt all foreign flag ships from Board jurisdiction regardless of American connections. By stressing a tramp steamer's temporary and fleeting contacts with an American port, *Benz* supports Board rulings that application of the Act to foreign flag ships is to be determined by case-by-case evaluation of American contacts as compared to foreign contacts. *Benz* also supports the Board's conclusion that "where the Labor Act is involved, 'foreign commerce of the United States' is both an important and necessary contact. . . ."

Should the Court go beyond the preemption question into the substantive issue of whether the Act applies in this case, then we urge that Board jurisdiction over Incres would not involve extraterritorial application of the Act, since Incres operates as an essentially domestic enterprise in the commerce of this nation. Moreover, extraterritorial application of the Act is not objectionable because, as with anti-trust laws, Congress expressly intended that the Act apply extraterritorially to minimize burdensome effects on the foreign commerce of this nation.

Neither flag law, nor treaty law, nor any other principle of international maritime law, is an obstacle to assertion of Board jurisdiction. Congress has the unquestionable power to extend our laws to foreign flag ships engaged in the commerce of this nation. Board regulation will in no way impugn the Liberian nationality of the *Nassau* and *Victoria* which is determined by their flag, nor the right of Liberia to exercise the traditional authority of the flag nation in matters of registration, taxation, requisition, ship-board discipline, etc.

Finally, Board jurisdiction will result in a uniform national labor policy applicable to foreign flag shipping. The alternative is chaos with state courts of every coastal state in the nation at liberty to apply a multiplicity of conflicting and disparate state laws to the problem.

POINT I.

The New York Court of Appeals correctly held that this dispute must first be decided by the NLRB since administrative remedies have not been exhausted and the subject matter is "arguably" or "potentially" within Board jurisdiction.

Incres Has Failed To Exhaust Administrative Remedies.

On May 16, 1960, IMWU filed unfair practice charges against Incres alleging violations of Sections 8(a)(1) and (5) of the LMRA (29 U. S. C. §158(a)(1) and (5)) based on Incres' interference with and coercion of its employees and its refusal to bargain collectively with IMWU (R. 27, 203). The Board has conducted an extensive investigation of the merits of the charges and the underlying question of jurisdiction and a ruling is due.

From the earliest days of the Wagner Act, this Court has required that when charges are before the Board, the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, and then such review may be had only through the appropriate federal circuit court as provided in Section 10(e) or (f) of the Act (29 U. S. C. §160(e) or (f)).

A leading case so holding is *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), which vacated an injunction against the Board hearing unfair labor practice charges. The injunction had been obtained on the employer's claim that its operations were not within the interstate or foreign commerce of this nation. In authorizing the Board to complete its hearing, this Court held that the Board was exclusively empowered by Congress to hear and determine the controversy "in the first instance," and judicial authority could not be substituted. After the Board's decision issued, an appropriate circuit court would have full authority to review "all questions" pertaining to jurisdiction. The employer could suffer no harm in following this procedure, since under the scheme of the Act no penalty attaches to disobedience of a Board order until enforcement by a circuit court. To the same effect: *Newport News Shipbuilding and Drydock Co.* v. *Schauffler*, 303 U. S. 54 (1938).

This Court need go no further than the *Myers* case to affirm the New York Court of Appeals.

The Dispute between IMWU and Incres is "Arguably" or "Potentially" Subject to Board Jurisdiction.

Even if unfair practice charges were not pending, the subject matter of this dispute is "arguably" or "poten-

tially" subject to Board jurisdiction and therefore under the preemption rule of *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245 (1959): "States as well as federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

The "arguably subject" preemption rule of *Garmon* recently received strong reaffirmation by this Court in *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U. S. 173 (1962). There the Minnesota State courts had enjoined picketing by a trade union whose membership consisted predominantly, if not exclusively, of supervisors who did not fall within the coverage of the Labor Act. The Minnesota courts ruled that this type of union was not a "labor organization" as the term is defined in the Labor Act. The ruling was based on "persuasive evidence" in the record that the union itself "had steadfastly maintained in proceedings before the NLRB that it was *not* a labor organization" within the meaning of the Act.

This Court nevertheless found that past action by the NLRB raised the "arguable possibility" that the Board would find the union to be a "labor organization" subject to the Act; and on the strength of this possibility ruled that the Minnesota courts were without jurisdiction to adjudicate the controversy. Earlier preemption decisions of this Court are in accord, e.g., *Garner* v. *Teamsters, etc. Union*, 346 U. S. 485 (1955); *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1957); *Weber* v. *Anheuser Busch, Inc.*, 348 U. S. 468 (1955).

Ineres contends that the "arguably subject" rule first announced in *Garmon* is not applicable to this case because the issue here is not whether particular conduct is protected or prohibited under Section 7 or 8 of the Act, but the "threshold" question of whether the Act applies at all.

In making this contention, Incres misconceives the significance of *Garmon, Interlake, Myers,* and the other preemption cases. Moreover, the contention is not enhanced by the sweeping claim that the presence of the Liberian flag without more is an absolute prohibition to Board jurisdiction.

The "threshold" question of whether the Act is applicable at all, regardless of the type of conduct complained of, has frequently been raised in preemption cases. *Interlake* and *Myers* involved precisely this sort of issue. The presence of a "threshold" problem in those cases was held in no way to detract from the exclusive primary jurisdiction of the Board to hear and determine the dispute "in the first instance."

In *Interlake* this Court pointedly observed that the issue presented as to the meaning of "labor organization" within the contemplation of the Act was different from the issue in *Garmon* which was "whether certain activities were protected by §7 or prohibited by §8 of the Act." This difference, however, was held to be without significance on the question of the Board's exclusive jurisdiction (370 U. S. at 178):

> "We see no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§7 and 8 of the Act to substantive conduct. Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence."

The same reasoning applies with the same force to this case where the process is one of interpreting and applying the statutory definitions of "commerce" and "affecting

commerce," and, in general, delineating the jurisdictional scope and reach of the Act as to specific employers, their vessels and crews.

It can hardly be questioned that Incres in its complaint has charged IMWU with obvious unfair labor practices under Section 8(b) of the Act (29 U. S. C. §158(b)), i.e.: inducing a strike through "fear of reprisal"; seeking by picketing and otherwise to coerce or compel recognition; engaging in a jurisdictional dispute; and inducing work stoppages among secondary employees (R. 8-9). Exclusive Board jurisdiction over activities of this sort is beyond the "arguable"—it is certain.

On the other hand, if the allegations of the complaint prove baseless, as we contend, then it is obviously "arguable" or "potential" that IMWU is engaged in protected activity under Section 7 (29 U. S. C. §157), also within the exclusive competence of the Board.

The Attorney General in an *amicus* brief to the Board in *West India Fruit and SS. Co.*, 130 NLRB 343 (1961), specifically acknowledged the Board's primary authority to make the initial determination as to its own jurisdiction in foreign flag shipping cases:

> "It is elementary that the Board has the duty in the first instance of making the determination of whether the seamen and ships involved are employees and employers within the Act, and that the terms 'employee' and 'employer' in the Act 'draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.' *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403 (1947). To its task the Board must not only bring an appreciation of economic realities but is 'free to take account of the more relevant economic and statutory consider-

> ations' in determining whether or not the Act is applicable. *NLRB* v. *Atkins & Co., supra,* at 403."

Board jurisdiction has expressly been held "arguable," and the claim that a foreign flag is an absolute bar rejected in this case (R. 289), and in *Navios Corp.* v. *National Maritime Union,* 402 Pa. 325, 332, 166 A. 2d 625, 629 (1960), *cert. den.,* 366 U. S. 905 (1961); *Afran Transport Co.* v. *National Maritime Union,* 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); and *Atlantic Robin SS Corp.* v. *International Maritime Workers Union,* Docket No. 563, 636 (Tex. Dist. Ct., Harris Co., Jan. 13, 1961—not reported).

These holdings are far more persuasive than *Sociedad Nacional de Marineros de Honduras* v. *McCulloch,* 201 F. Supp. 82 (D. C. D. C. 1962), where Judge Holtzoff, adopting the absolute rule that the LMRA can never be applicable to a foreign flag ship, enjoined a scheduled Board election for crewmembers of the United Fruit Company's Honduran flag vessels which operate regularly between the United States and Central American ports and are used interchangeably with the same company's American flag vessels.

In a parallel case involving the identical facts but a different plaintiff, the Second Circuit reached the same erroneous result as Judge Holtzoff but expressly rejected the flag-law-governs-all rationale (*Empresa Hondurena de Vapores, S. A.* v. *McLeod,* 300 F. 2d 222, 231 (2d Cir. Jan. 12, 1962)):

> "The Board is right in saying the scope of its powers in respect of (seamen) is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere 'figure of speech' whose fictitious character was exposed long ago, *Wildenhus' Case,*

120 U. S. 1 (1887); *Cunard SS Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923)."

The same view was expressed by the Appellate Division in this case (R. 266, 267):

> ". . . the Liberian nationality of plaintiff and the Liberian registry of the ships should not be conclusive of the character of shipping involved. The National Labor Relations Board, in appropriate cases involving 'American' ships flying foreign flags of convenience has so determined, and the conclusions are entirely persuasive (*Peninsular & Occidental S. S. Co.*, 120 N. L. R. B. 1097 [1958]; *Eastern Shipping Corp.*, N. L. R. B. Case No. 12-RC-415 [1959], CCH-NLRB Decisions ¶56,698 [1959-1960]). So, too, has the United States District Court in this district (*Afran Transport Co.* v. *Nat. Maritime Union*, 169 F. Supp. 416 [Bryan, J.]), in an especially well-considered opinion, cited with evident respect by the Supreme Court in *Marine Cooks Union* v. *Panama S. S. Co.*, *infra*, 362 U. S. 365."

Compare: *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 127 (1917).

If the Board may exercise jurisdiction over some foreign flag ships, then certainly the issue is arguable in this case and for the Board to decide "in the first instance." The Board's recent decisions in the field underscore the widsom of the *Interlake*, *Myers* and *Garmon* approach to the problem, i.e.: *West India Fruit and SS Co.*, 130 NLRB 343, 47 LRRM 1269 (1961), *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRPM 1138 (1961); *Hamilton Bros.*, 135 NLRB No. 85, 48 LRRM 1740 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32, 49

LRRM 1777 (1962). Each of these cases required of the Board what this Court described in *Garmon* as "*ad hoc* inquiry into the special problems of labor management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration" (359 U. S. at 242). No uniform fact situation is discernible to which a generalized formula applies.

Foreign-flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros.*, and *Owens-Illinois*), or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular and Occidental* and *United Fruit*); or they may, as here, be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Eastern*). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade the same as Incres does (*Peninsular and Occidental* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); or they may tow barges loaded with pulpwood (*Owens-Illinois*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular and Occidental, Eastern, United Fruit, Owens-Illinois*).

In its most recent foreign flag decision, *Dalzell Towing Company, Inc.*, 137 NLRB No. 48, 50 LRRM 1164 (1962), the Board declined to assert jurisdiction over a Panamanian flag vessel even though it concluded that the vessel was operated as "essentially a domestic U. S. enterprise."

Nominal ownership of the vessel was held by a Panamanian corporation, but that corporation in turn was the "instrumentality" of an established United States shipping corporation, both corporations having common officers and directors, sharing the same office space, and operating as an integrated enterprise. Moreover, the Board found that in the year prior to the filing of the petition, the vessel was "chartered primarily to American shippers," and "a large majority of her voyages touched United States ports." Jurisdiction was declined on the ground that the United States contacts of the vessel were not "sufficiently substantial." The character of the shipping involved was determined by the business of the charterers rather than the business of the owner-operator, and the charterers could be anyone in the world charter market. Because of this "fortuitous element underlying the physical contacts of the vessel with the United States," the Board chose to "defer to the law of the flag." The *amicus* brief of the Republic of Panama curiously contains no reference to this decision.

From the foregoing review of recent Board decisions, we see that in each case the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether the foreign aspects of a particular case militated against the assertion of jurisdiction. To the Board's credit it has filled its decision-making role with courage and distinctive scholarship.

The Board's leading case, *West India*, handed down in the face of the combined opposition of three cabinet departments—Justice, State and Defense—is an outstanding opinion that speaks for itself as to the quality of the Board's dedication to the problem.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceived of its task in *West India* as "'ascertaining and valuing points of contact between the transactions and the governments whose competing laws are involved.'" (130 N.L.R.B. at 354). With respect to the Labor Act, the Board properly concluded that "'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*."

In employing the contacts test, the Board did not ignore flag doctrine or other principles of maritime or international law. It simply assigned to these factors their proper weight in the general reckoning. Incres and the *amicus* countries are highly critical of the contacts test because it cuts through fictions and verbalisms and emphasizes concrete operational facts. The test provides a rational, policy-oriented basis for resolving this controversy, and one for which the special competence of an administrative agency such as the Board is bound to develop many excellent refinements.

The contention that under the contacts test every foreign flag vessel which regularly touches our shores, including the *Queen Mary*, is subject to Board jurisidiction stems from a distorted view of *Lauritzen* upon which *West India* is grounded. *Lauritzen* requires that in "ascertaining and valuing points of contact" due regard must be had for the "competing" interests of foreign governments. A British flag vessel, owned by British interests, employing a British crew, and sailing regularly from the ports of Great Britain in the commerce of that nation, would unquestionably have superior contacts with that country than with the United States, even though the vessel

regularly calls at American ports. The Board would undoubtedly so hold.

As an example, in *Dalzell Towing Company, Inc.*, 137 NLRB No. 48, 50 LRRM 1164 (1962), the Board specifically stated that: ". . . the mere fact a ship visits U. S. ports sporadically or regularly does not alone determine whether or not the Act is applicable. The test is whether or not the shipping is that of this nation, rather than that of a foreign nation." A similar statement is contained in *United Fruit Company*, 135 NLRB No. 25, 49 LRRM 1138 (1961).

As for the suggestion that the contacts test will breed retaliation, certainly the *amicus* countries, including the Republic of Liberia, find nothing offensive in the desire of the crews of the *Nassau* and *Victoria*, predominantly comprised of Italian nationals, to improve their working conditions. Any reprisals against United States' shipping by the Republic of Liberia or other nations could stem only from venal motives such as the fear that the susceptibility of some Liberian flag ships to organizing efforts of American maritime unions will discourage new Liberian registrations and thereby curtail revenue from that source. In this regard, the Republic of Panama discloses the real objection to NLRB jurisdiction when it complains in its brief that Panama has fallen from eighth to twelfth in world standing as a ship owning nation "largely as a consequence of the uncertainties as to the lawful limits of the American Labor Board's jurisdiction over foreign flag vessels."

A genuine ground for protest would be present if assertion of Board jurisdiction were to constitute a challenge to the nationality of the *Nassau* and *Victoria* and the legitimacy of their registration under the Liberian flag. The Board in *West India*, however, expressly disavowed

any such intention or result in applying the Act to a foreign flag vessel.

If retaliation or the sanctity of nationality were genuine fears, then apprehension over the reaction of the Italian government should have prompted the Board to decline jurisdiction over the American based alien clerical employees of the Italian Lines in *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957). The nationality of neither the employer nor the employees was impugned by the Board's unchallenged assertion of jurisdiction in that case. The same would be true here.

In any event, in determining the jurisdictional reach of the LMRA, as the statute was enacted by Congress, the favor or disfavor of foreign nations is hardly a relevant factor. If Congress were motivated by vague anxieties of retaliation, it would have long ago eschewed enactment of immigration, custom, health and safety laws.

Over the years, a constant stream of protest has been issuing forth from foreign maritime nations critical of the various forms of regulation and control exercised by United States agencies over foreign flag shipping in our national interest. This protest has not deterred the enforcement of federal statutes, nor has it resulted in retaliation against United States flag shipping.

Examples chosen at random from the maritime pages of recent issues of the New York Times disclose such items as vigorous protest by Mexico against refusal of U. S. Coast Guard to permit a Mexican cruise ship to sail from New York harbor for safety reasons[1]; "concerted drive" by foreign nations against implementation of the Bonner Act by the Federal Maritime Commission, which is accused

[1] New York Times, December 23, 1961, p. 1; January 7, 1962 p. 87.

of seeking to regulate rate making and other practices of foreign flag shipowners in Europe as well as the United States[1]; announcement of Prime Minister Macmillan that he will use "any means, official or unofficial," to thwart efforts of the Federal Maritime Commission to regulate the affairs of foreign shipping conferences[2]; refusal of eight British shipping lines to produce documents subpoenaed by the Federal Maritime Commission[3]; charge by a Danish shipping concern that the United States' cargo preference laws are "balkanizing" the high seas.[4]

We agree with Incres and the *amicus* countries that the contacts test may apply on a reciprocal basis. Thus, if an American flag ship ever operated as an enterprise in the commerce of a foreign nation the way the *Nassau* and *Victoria* operate as a United States' enterprise, and if such American flag vessel were as devoid of American contacts as the *Nassau* and *Victoria* are devoid of Liberian contacts, we would have no hesitation in saying that the foreign nation would be at liberty to exercise the type of regulation over the ship that we are seeking to have the Board exercise over the *Nassau* and *Victoria*.

Benz Does Not Bar Assertion of Board Jurisdiction.

We have no quarrel with this Court's decision in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958). We disagree with Incres, however, that it rules out application of the Labor Act to all foreign flag ships regardless of the circumstances of their operations. *Benz* was rejected as a conclusive bar to Board jurisdiction by the New

[1] *Ibid.*, May 18, 1962, p. 62.
[2] *Ibid.*, May 9, 1962, p. 86.
[3] *Ibid.*, May 20, 1962, p. 73.
[4] *Ibid.*, July 7, 1962, p. 52.

York Court of Appeals in this case (R. 288); the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 332 (1960); the federal district court in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); and, of course, the NLRB in *West India Fruit and SS Co.*, 130 NLRB 343, 361-364 (1960).

To be sure, *Benz* did hold the Act inapplicable to a dispute arising on a foreign flag ship operated by a foreign crew under foreign articles which "erupted" while the vessel happened "temporarily" to be in an American port. The case involved a foreign tramp steamer, which, after one or two fleeting and haphazard contacts with an American port, became embroiled in a labor dispute between the master and crew in which American labor unions thereafter joined as partisans of the crew. After picketing was enjoined, the vessel sailed away and two years later had not touched an American port again. This Court stressed in its opinion the happenstance and fortuitous quality of the vessel's American contacts stating (353 U. S. at 142):

> "The only American connection was that the controversy erupted while the ship was transiently in the United States port and American labor unions participated in its picketing."

The distinctive feature of *Benz* that the vessel there had only a "temporary" or "transient" connection with an American port has been repeatedly recognized (R. 288; *Afran Transport Co., supra; Navios Corp., supra*).

In *Marine Cooks and Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this Court underscored this limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947, 29 U. S. C. A. §141 *et seq.* governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters."

Benz hardly warrants the conclusion that coverage of the Act is barred where, as here, the *Nassau* and *Victoria* operate almost exclusively in American commerce. As this Court has admonished, "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133 (1944).

Incres itself is cognizant of the critical significance in the *Benz* holding of the transient or temporary connection with American commerce. For this reason, in framing the questions to be presented on appeal, it felt constrained to take the position that its connection with American commerce is "transient" or "temporary," and that the labor dispute involved here took place while its vessels were "temporarily" in an American port.

For Incres to contend that its regularly scheduled round-trip voyages departing from and returning to the Port of New York constitute "transient" or "temporary" connections is to strangle all meaning out of these words. Without its New York business, Incres would be defunct. Its New York business is the totality of its operations.

It is the very nature of maritime commerce that the actual port time of a vessel is a relatively small fraction of its total operating time, but this in no way renders regular contacts of a vessel with a particular port "temporary." New York is the home port of the American flag liner

SS United States. During the cruise season the *Nassau* and *Victoria* are probably in New York as often as the *United States.* Incres was far more candid in its brief to the New York Court of Appeals where it acknowledged that it was engaged in "substantial continuing American foreign commerce."

The fact that the nationality of the crewmembers is Italian has no bearing on the initial question of the Board's primary competence to determine its own jurisdiction. Although non-resident aliens, they are still, in the words of the *Benz* opinion (353 U. S. at 154), "workingmen of our own country," and they are employed by an essentially domestic enterprise. The Act has always been held applicable in a non-discriminatory manner to aliens and American citizens even where employed by a foreign employer so long as such employer is engaged in the commerce of this nation. *Italia Societa per Azioni di Navigazione,* 118 NLRB 1113, (1957); *Brown Company,* 109 NLRB 173 (1954).

We do not read the generic reference in *Benz* to "American employers and employees" to mean that the Act is never applicable to non-resident aliens or to foreign employers who carry on their business in this country. When alien workers are employed by employers engaged in business in the United States, the aliens are, for the purposes of the Act, American workers, and they enjoy the same protection under the Act as citizen workers. By the same token, when an alien employer elects to engage in the commerce of this nation he should be bound by the same labor laws that apply to his American competitors. Congress could not have intended otherwise.

Thus the Act applies where an Italian ship operator, employing alien workers, engages in business in this country. *Italia Societa per Azioni di Navigazione, supra.*

POINT II.

Incres is an essentially domestic enterprise in the commerce of this nation and Board jurisdiction over its operations would not constitute an unwarranted extraterritorial application of the Labor Act.

Should the Court choose to go beyond the preemption question and consider the specific issue now before the Board of whether the Act applies to Incres, then we contend that it does. The remainder of the brief deals with this contention.

Incres Is Engaged In The Commerce Of This Nation.

We agree with Incres that the LMRA must be considered as a whole in its application to foreign flag ships. The fundamental purposes of the Act are "to promote the full flow of commerce" and safeguard it from "injury, impairment or interruption" by eliminating certain practices "which have the intent or necessary effect of burdening or obstructing" it (29 U. S. C. §§141, 151).

There can be no question that the weekly Caribbean cruises of the *Nassau* and *Victoria* originating and terminating in New York fall squarely within the Act's definition of "commerce" (Section 2(6), 29 U. S. C. §152(6), and see Appendix to Incres' Brief, p. 53). This definition is not "literally universal" as Incres suggests. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31 (1937), this Court pointed out that Section 2(6) specifically defines "commerce," and the definition "affecting commerce" in Section 2(7) (29 U. S. C. §152(7)) is "one of exclusion as well as inclusion."

Incres concedes that it is engaged in "commerce" and that its operations "affect commerce" as defined in the

Act. Incres further acknowledges that the sixty cruises completed annually by both vessels, together with the operations of Incres Agency, are a more than *de minimus* involvement in commerce. As already noted, Incres in its brief to the New York Court of Appeals admitted that it was engaged in "substantial continuing American foreign commerce." It remains therefore to consider whether there is any principle of maritime or international law which requires the denial of Board jurisdiction for which all statutory prerequisites have been met.

The Extraterritorial Question.

One of Incres' main contentions is that application of the Act to its operations would constitute an unwarranted extraterritorial extension. The view that the *Nassau* and *Victoria* are foreign territory is an illusion of such embarrassing proportions that after advancing it in an early portion of its brief, Incres later discredits it as a "fiction," and so does the Republic of Liberia. Controlled from operating offices at 39 Broadway, and servicing an American clientele, the *Nassau* and *Victoria* are nothing more than floating hotels in the tourist traffic of this nation. Incres and the Republic of Liberia as well as the other *amicus* countries do not question that when the *Nassau* and *Victoria* come weekly into the Port of New York they subject themselves to our laws. As this Court stated in *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 372 (1960):

> ". . . a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist."

A fuller statement of the same "generally recognized" principle is found in *Cunard SS. Co.* v. *Mellon*, 262 U. S.

100, 125 (1923), where quoting the words of Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144, this Court stated:

> "'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.'"

While accepting that the laws of this country, including presumably the LMRA, are applicable to the *Nassau* and the *Victoria* when they are in New York, Incres argues that when the vessels are in international waters, the Act ceases to apply. Since alternating application and non-application of the Act would be an absurdity, Incres contends that the Act may not apply at all.

If operation of a vessel in international waters were alone sufficient to preclude Board jurisdiction, then the Board would lack jurisdiction over American flag vessels. To avoid this implication, Incres resorts to the confessed invention that a ship is a floating portion of the nation

whose flag it flies. In Incres' view, therefore, application of the Act to the *Nassau* and *Victoria* while in international waters would constitute a forbidden extraterritorial extension.

To exempt Incres from its obligations under the LMRA simply because the *Nassau* and *Victoria* fly the Liberian flag, is to do much more than accord traditional respect to the foreign flag of a friendly nation, it is rendering abject obeisance and servile homage to the myth of a foreign power within the boundaries of our own country.

When an employer's business is so thoroughly entrenched in the commerce of this nation that from every point of factual reckoning it is an American business, then the metaphor of the ship—territory is scarcely a basis for excusing obedience to a statute of this country that is clearly applicable by its terms.

Laying aside these considerations, and assuming that the *Nassau* and *Victoria* are extraterritorial entities of some sort, it still does not follow that they are immune from the Act. For there can be no question that in regulating commerce Congress can and has extended the reach of our laws beyond the geographical boundaries of the nation.

Thus, in *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287 (1952), which involved extraterritorial application of the Lanaham Trade Mark Act (15 U. S. C. § 1051 *et seq.*), this Court stated that it did not matter that:

> "Petitioner affixed the mark 'Bulova' in Mexico City rather than here, or that his purchase of supplies in the United States to be used in his Mexico business when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of

> an unlawful scheme. 'In such a case it is not material that the source of the forbidden effects upon commerce arise in one phase or another of that program.' *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237. In sum we do not think that Petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders."

Perhaps the best known line of cases giving extraterritorial effect to United States laws are those involving the anti-trust laws: *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *United States* v. *Aluminum Co.*, 148 F. 2d 416, 444 (2nd Cir. 1945); *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633 (2nd Cir. 1956); *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (E. D. Ohio 1949), aff'd with modifications not here relevant, 341 U. S. 593 (1951); *United States* v. *R. P. Oldham Co.*, 152 F. Supp. 818, 822 (N. D. Cal. 1957); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504, 592 (S. D. N. Y. 1951).

In these cases, as in the *Steele* case, the application of our laws to conduct taking place in foreign territories is based on the prohibited *effects* of that conduct on the interstate and foreign commerce of this nation. In other words, when in regulatory legislation Congress establishes the "effects" upon United States commerce as the jurisdictional criterion, the courts do not hesitate to vindicate the Congressional purpose even where doing so may in a very limited and special sense require extraterritorial application of the statute.

In *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 641 (2nd Cir. 1956), the reach of the anti-trust laws was delineated as follows:

> "While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce 'with foreign nations or among the several states.' This power is now generally interpreted to extend to all commerce, even in intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. . . ."

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2nd Cir. 1945), a contract made outside the United States by foreign parties and purporting to operate only outside the United States was condemned on the ground that it was intended to and did restrain the foreign trade of this country. The court stated:

> "Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."

There can be no question, as we have shown, that the fundamental objective of the Labor Act is to eliminate practices which have the "effect of burdening or obstructing commerce," and "commerce" includes "trade . . . between any foreign country and any state. . . ." (29 U. S. C. 152 (6)). Necessarily, therefore, Congress must have envisioned that regulation under the Act would include the foreign commerce of the United States and to that extent the Act would apply extraterritorially. As this Court observed in *Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 222 (1938): ". . . it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion (for determining jurisdictional coverage of the Act)."

For this reason, the canon of construction upon which Ineres heavily relies that an act of Congress, "unless a contrary intent appears," will be presumed to apply only within the territorial jurisdiction of the United States is plainly inapplicable. To begin with, as this Court observed in *Foley Bros. Inc. v. Filardo*, 336 U. S. 281, 285 (1949), application of the canon is a "valid approach" in ascertaining "unexpressed" Congressional intent. But in the Labor Act, Congress has expressed its intent that the Act apply to both the domestic and foreign commerce of the nation to the end that certain deleterious effects on that commerce be eliminated.

Comparison of the jurisdictional provisions of the Eight Hour Law, which was involved in *Foley Bros., supra*, with those of the Labor Act, highlight the reason why the canon of construction was applicable there but not here. The Eight Hour Law (40 U. S. C. §325(a)) provides that the "wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract (between the United States and private contractors) shall be computed on a basic day rate of eight hours. . . ." *Foley Bros.* held the law inapplicable to an American citizen working under such a contract in Iraq and Iran on the ground that it could not be presumed that the literally universal jurisdictional coverage extended the law's regulation to the working conditions of foreign nations.

In contrast to the literally universal coverage of the Eight Hour Law, the jurisdictional coverage of the LMRA is limited to the commerce defined. Moreover, under the Eight Hour Law coverage is determined by the status of the individual, i.e., employment by a contractor engaged in fulfilling a government contract. Under the LMRA, coverage turns on the *effects* on United States commerce. An

employee could satisfy the literal jurisdictional requirements of the Eight Hour Law performing his entire service outside the territorial limits of this country, as was done in *Foley Bros.* For the Labor Act to be applicable, there must be trade between a foreign country and this country. Incres' vessels regularly touch United States shores.

If the purpose of the LMRA to eliminate harmful effects on United States commerce is to be realized, the Act must in the metaphorical sense be applied extraterritorially in instances such as shipping, where the very business involved is a moving instrumentality of foreign commerce. The test for such application ought not to be the specious one of the ship-territory, but whether the contacts of a vessel with United States commerce are so substantial in comparison with its competing contacts with other nations as to justify the Board in asserting jurisdiction. This is precisely the view taken of the problem by the Board in *West India* (*supra* p. 22).

Incres' statement that the canon of construction favoring territoriality has been consistently applied in construing "American labor legislation" does not survive scrutiny. The airlines cases cited to support the statement, i.e., *Airline Dispatchers Assn.* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951), *cert. den.*, 342 U. S. 849 (1951) and *Airlines Stewards & Stewardesses Assn.* v. *Northwest Airlines Inc.*, 162 F. Supp. 684 (D. Minn. 1958), aff'd. 267 F. 2d 170 (8th Cir. 1959), *cert. den.*, 361 U. S. 901 (1959), involved airlines employees who lived and worked entirely outside the United States. Their employment did not involve contacts with United States at any time. Moreover, the Railway Labor Act under which those cases arose, is expressly limited to activities within the United States.

Incres also cites *New York Cent. R. Co. v. Chisholm*, 268 U. S. 29 (1925) where the Court declined to extend the Federal Employers Liability Act to an accident which took place outside the United States but instead applied the "almost universal rule" that liability in tort actions is determined by the law of the place of the occurrence. This does not tell us anything about the scope of the LMRA which was fashioned to mitigate the effects of industrial strife on domestic and foreign commerce. In *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 377 (1932), this Court recognized the inapplicability of the *Chisholm* holding to the maritime industry stating: "We do not read the (Jones) Act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability on carriers by water."

In *Marine Cooks & Stewards v. Panama SS. Co.*, 362 U. S. 365 (1960), the Norris-LaGuardia Act was held applicable to picketing by an American labor union against a foreign flag ship.

Additionally, the Jones Act, maritime counterpart of the Federal Employers Liability Act, has in a number of cases been applied to accidents occurring in international waters on foreign flag ships. *Gerradin v. United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. den.*, 287 U. S. 642 (1932); *Gambera v. Bergoty*, 132 F. 2d 414 (2d Cir. 1942), *cert. den.*, 319 U. S. 742 (1943); *Rodriquez v. Solar Shipping, Ltd.*, 169 F. Supp. 79 (S. D. N. Y.); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S. D. N. Y.) (1953); *Carroll v. United States*, 133 F. 2d 690 (2nd Cir. 1943); *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959); *Babolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236 (S. D. N. Y. 1958).

The relevancy of Jones Act cases to the issue of application of the LMRA to flag of convenience ships was pointedly noted by the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960), *cert. den.*, 366 U. S. 905 (1961):

> "The appellants point out that it is the policy of the United States Government to recognize a vessel's foreign 'flag of convenience.' Since, however, this policy does not deter the Federal Court from looking behind such flags in cases involving federal regulatory statutes like the Jones Act, for instance, it may reasonably be inferred that neither should it deter the NLRB from looking behind such flags in cases involving the LMRA" (at 338).

Maritime Legislation Has Been Applied To Foreign Flag Ships Without A Clear Expression of Congressional Intent That This Be Done.

In support of its extraterritorial thesis, Incres at page 28 of its brief cites a number of United States laws in the area of immigration, customs and safety which expressly require application to foreign flag ships. Incres argues from this that the absence of an express reference to foreign flag ships in the LMRA manifests Congressional intent that they be excluded from coverage of the Act.

One immediate shortcoming with this argument is that the LMRA is not a maritime statute, it is a general labor law establishing and regulating certain rights and duties between employers and employees. It is unquestionably applicable to maritime employers and employees. *NLRB* v. *Waterman SS. Corp.*, 309 U. S. 206 (1940).

It is of no significance whatever that the LMRA does not expressly include foreign flag ships, for the Act contains no explicit inclusions of any category of employers or employees, although it does contain specific exclusions

(Sections 2(2) and (3), 29 U. S. C. §152(2) and (3)). In other words, the Act's jurisdictional coverage rests on the "effects" test, and it is a statute of general inclusion and only specific exclusion. If anything is meaningful about the silence of the Act regarding foreign flag ships, it is that the Act does not expressly exclude this class of employer or employee. As Mr. Justice Holmes commented in *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 239 (1931), where the Jones Act was held applicable to a suit by a stevedore injured on a German flag ship:

> "... the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them."

Aside from the absence of specific inclusions in the LMRA, Incres is simply incorrect when it implies that the only maritime legislation applicable to foreign flag ships is legislation which clearly expresses Congressional intent that it be so applied. There are many examples of maritime statutes which have been applied to foreign flag ships without clear expression of Congressional intent.

The Jones Act, 46 U. S. C. §688, is a perfect illustration of this. In *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2nd Cir. 1932), *cert. den.*, 287 U. S. 642 (1932), the Second Circuit stated in holding the Jones Act applicable to an American-owned foreign flag vessel:

> "If defendants' contention be sound, American owners and chartered owners of vessels can escape liability to American seamen employed on their ships by procuring registry under a foreign flag. We feel little doubt that the broad contention of the defendant that vessels of the American merchant marine are limited to those documented under the laws of the United States is not well founded" (at p. 927).

The following wage provisions of the Merchant Seamen's Acts have also been held applicable to foreign flag ships despite the absence of any clear expression of Congressional intent that this be done:

46 U. S. C. §593 dealing with payment of seamen's wages upon loss or wreck of a vessel. *Avgoustis* v. *Erini Shipping Co.*, 177 F. 2d 461 (2nd Cir. 1949);

46 U. S. C. §594 providing for payment of seamen's wages in case of improper discharge. *Avgoustis* v. *Erini Shipping Co., supra;*

46 U. S. C. §596 fixing the time for payment of seamen's wages upon termination of employment. *The Flatero* v. *Arias*, 206 F. 2d 267, 274 (4th Cir. 1953); *The Sonderborg*, 47 F. 2d 723 (4th Cir. 1931).

Similarly, the section in the federal shipping code providing for limitation of an owner's liability in the event of loss or damage to a vessel, as orginally enacted (9 Stat. 635 (1851)), did not contain any express reference to foreign flag vessels but was nevertheless held applicable to them. *The Scotland*, 105 U. S. 24 (1882). Subsequently this section was amended to refer to foreign flag vessels expressly, but this in no way reflected on decisions prior to the amendment (49 Stat. 960, 46 U. S. C. §183 (1935)).

The Maritime Labor Act.

Incres oddly finds support for its contention that the LMRA does not apply to foreign flag vessels in the fact that the Maritime Labor Act (MLA), 52 Stat. 965 (1938), repealed in 1943, is restricted by its terms to United States flag vessels. Incres argues that we can assume from this retriction an intention on Congress' part similarly to limit the LMRA.

We believe that the difference between the MLA and the LMRA implies precisely the opposite of what Ineres suggests. By expressly limiting the coverage of the MLA, Congress implicitly confirmed a broader coverage for the LMRA. Support for this is found in Section 1002 of the MLA (52 Stat. 965) which states:

> "The provisions of this title shall not in any manner affect or be construed to limit the provisions of the National Labor Relations Act. . . ."

The 1959 Amendment to LMRA.

Finally, a recent amendment to the LMRA practically requires the Board to assert jurisdiction over foreign flag vessels whose substantial contacts with American commerce outweigh their contacts with the flag nation or any other nation. Thus, in late 1959 Congress added the following proviso to Section 14(c)(1) of the Act (29 U. S. C. §164(c)(1)):

> ". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

On May 23, 1958, the Board had asserted jurisdiction over two Liberian flag ships which sailed between the United States and Cuba. *Peninsular & Occidental SS Co.*, 120 NLRB 1097. On December 11, 1958, the Board issued a decision that it would assert jurisdiction over all "freight enterprises engaged in the furnishing of interstate transportation services which derive at least $50,000 gross revenue per annum from such operations." *H. P. O. Service, Inc.*, 122 NLRB 394, 395 (1958). Congress presumably had knowledge of these cases when it enacted Section 14(c)(1).

Moreover, Congress was well aware of the rapid growth of flag of convenience fleets. *Hearings On Vessel Transfer, Trade-In, And Reserve Fleet Policies Before Committee On Merchant Marine, and Fisheries*, 85th Cong., H. R. 1st Sess. (1957). Indeed, almost contemporaneously with debate on the Landrum-Griffin amendments, the House Sub-Committee on Merchant Marine was holding hearings on foreign flag affiliations of subsidized American shipowners. *Hearings Before The Committee On Merchant Marine*, 86th Cong., H. R. 1st Sess. (1959).

While it is true that Section 14(c)(1) was directed primarily at filling the no-man's land created by *Guss v. Utah Labor Relations Board*, 353 U. S. 1 (1957), it is equally true that Section 14(c)(1) involved perhaps the most thorough and sweeping review of NLRB jurisdiction since the Board was created by the Wagner Act. It is a fair inference that in considering passage of this section Congress had before it the limits to which, up until that time, the Board had asserted its jurisdiction. We submit, accordingly, that Congressional failure to exclude from coverage of Section 14(c)(1) flag of convenience ships may well represent recognition of the appropriateness of the assertion of jurisdiction in *Peninsular & Occidental, supra*, and is therefore authority for the assertion of jurisdiction in this case.

With recent legislative history plainly favoring application of the Act to ships flying flags of convenience, and nothing in earlier legislative history negativing such application, the remedial design of the Act should be effectuated by sustaining NLRB jurisdiction.

POINT III.

Neither international maritime law, treaty law, nor any similar consideration bars assertion of Board jurisdiction over Incres' vessels.

Incres and the *amicus* countries set forth a number of alleged principles of international maritime law, comity and treaty law which they contend defeat exercise of Board jurisdiction. For the most part these "principles" are broad verbal generalizations or clichés such as a "vessel's nationality is determined by its flag." From phrases of this character Incres and the *amicus* countries claim to find in international law absolute prohibitions against assertion of Board jurisdiction in the foreign flag shipping field. They further contend that all organizing and protest activities of American maritime unions in the foreign flag sector are proscribed.

The Liberian Flag is Not an Absolute Bar to Board Jurisdiction.

The first contention made is that the presence of the Liberian flag and nothing more on the *Nassau* and *Victoria* is sufficient to oust the Board from jurisdiction. Thus Incres states in its brief:

> "We submit that the showing on this record that the two ships of petitioner are foreign flag ships is alone enough, under applicable principles of international maritime and treaty law, to defeat application of LMRA to those ships."

This claim advances a concept of absolute flag supremacy that is unknown to maritime law.

There is no question, as the Board observed in *West India*, that: "The United States with other maritime nations of the world, has as a principle of comity accepted the gen-

eral maritime law, including flag law doctrine. . . ." (130 NLRB at 353). Under this doctrine, nationality of a ship is evidenced by its papers and flag, the registering country determines for itself the "conditions on which it will grant its nationality to a merchant ship," and only the registering country can question the validity of a registration. There is no doubt also that the registering country acquires various aspects of authority over the vessel. *Lauritzen* v. *Larsen*, 345 U. S. 571, 584 (1953).

But all this has never been deemed to impose any limitations on the sovereign powers of Congress to legislate with respect to foreign flag vessels engaged in the commerce of this nation. As this Court stated in *Lauritzen* (345 U. S. at 592-3):

> "We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact."

As a matter of comity, the reach of our laws has at times been restricted to American flag vessels. But this is only a matter of comity and implies no inherent limitations on Congressional authority. *Wildenhus' Case*, 120 U. S. 1 (1887). The Jones Act cases (*supra*, pp. 33-34) perfectly illustrate the application of an American statute to occurrences on foreign flag vessels in international waters. As was stated in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929 (2nd Cir. 1932), *cert. den.*, 287 U. S. 642 (1932):

> "(I)t seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a ship owner who bears such an illusionary shield."

In short, when foreign flag vessels operate in the commerce of this country, this country shares authority over such vessels with the flag state. The extent to which this

country will assert such authority depends on a number of factors including the circumstances of the vessels' operations, the matter to be regulated, and the applicable statute. If the flag alone were the governing consideration, there would have been no need for this Court in *Lauritzen* to have enumerated contact points and connecting factors other than the flag. Similarly, in *Benz*, there would have been no need to emphasize the "temporary" or "transient" contacts with an American port.

While *Lauritzen* nominally attached "cardinal importance to the law of the flag," it nevertheless recognized that other contact points could outweigh the flag and expressly approved earlier Jones Act cases where the courts "pressed beyond the formalities of more or less nominal foreign registration" to enforce the obligations of "our law" (345 U. S. at 587).

Additionally, as the Board emphasized in *West India*, *Lauritzen* dealt with the Jones Act, and the contacts enumerated there reflect the problems arising under that statute. Other laws require emphasis of other contacts. In *Romero* v. *International Terminal Co.*, 358 U. S. 354, 382 (1959), this Court, while reaffirming the contacts criteria of *Lauritzen*, significantly admonished that, "due regard must be had for the differing interests advanced by the varied aspects of maritime law...." We are dealing here with a labor statute primarily designed to protect commerce, and which depends for its jurisdiction upon commerce. "Where the Labor Act is involved," said the Board in West India, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

Clearly, therefore, the naked fact that the *Nassau* and *Victoria* fly the Liberian flag is no obstacle to Board jurisdiction.

Application of the Labor Act to the *Nassau and Victoria* Will Not Detract From the Vessels' Liberian Nationality.

Intertwined with the claim of absolute flag supremacy, Incres and the *amicus* countries decry assertion of Board jurisdiction as somehow impugning the Liberian nationality of the *Nassau* and *Victoria*. The Board in *West India* expressly disavowed any such intention, stating that it accepted "without question" the Liberian nationality of the vessels and the paramount authority of Liberia over them (130 NLRB at 359):

> "The issue is whether the Liberian nationality of the vessel, *which we accept without question*, divests the Board of that jurisdiction it would have but for that foreign nationality. In finding that it does not, *we are not divesting or attempting to divest Liberia as the flag state of its paramount rights, for example, to control the movement of, to requisition, or to tax the vessel.* But there is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessel to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this Nation" (italics added).

The examples of typical consequences flowing from nationality contained in the quotation from *Oppenheim* at pp. 12-13 of the Republic of Liberia's brief would all be unaffected by the assertion of Board jurisdiction. Thus, while the *Nassau* and *Victoria* are at sea, Liberian law would determine the citizenship of a newly-born child, or the legality of a will or business contract. Liberia would similarly retain its authority to deal with crimes or disciplinary problems aboard the vessels. More important,

Liberia's authority to tax the vessels, control their registrations, fix standards of competence for unlicensed seamen and officers would all remain unaffected.

The nationality of a vessel is certainly no more sacred than the nationality of an individual. An alien visiting or doing business in this country is subject to our laws without his nationality being called into question. The same principle should apply to a foreign vessel which engages exclusively in the commerce of this country.

As we have shown, the concept of nationality as vesting in the flag state exclusive authority over a vessel has never been recognized in this country. Whenever the policies and welfare of this nation have called for it, Congress has not hesitated to extend our laws to foreign flag vessels. Of course, as a matter of comity, in those areas of authority where the affairs of a foreign flag vessel operating in the commerce of this nation have not involved interests of this nation, Congress has withheld its power to regulate. *Wildenhus' Case*, 120 U. S. 1 (1887).

This traditional respect accorded the vessels of friendly countries, however, has never implied acceptance of the exclusive authority of the flag nation. This is of particular importance for Panlibhon shipping, where the interests of the United States may be far superior to that of any other country. In most Panlibhon shipping the interests of at least two and often three nations are involved. The *Nassau* and *Victoria* are a perfect illustration of this. For here we have Liberian flag ships owned by Italian interests and manned by Italian crews operating exclusively in United States commerce.

The Board pointed out in *West India* that Panama, Liberia and Honduras have acquiesced in an arrangement whereby the United States has secured pledges from American owners of Panlibhon ships to make them available for

requisition by this country in time of national emergency (130 NLRB at 364-5). This "effective control" by the United States applies even to Panlibhon ships built in recent years that have never sailed under United States flag. If this country can reserve to itself the important right of requisition over much of Panlibhon shipping there obviously is nothing left to the claim of exclusive authority for the flag nation.

The thesis that the flag nation exclusively controls a vessel is simply another form of expression of the now thoroughly discredited fiction that a ship is a territorial extension of the nation whose flag it flies. This fiction originated in an earlier time when there was no Panlibhon shipping, and vessels on the high seas sailed under the flags of legitimate major maritime powers by whom they were in fact controlled. While the fiction may originally have had a limited serviceability, it no longer does, and both Incres and the Republic of Liberia recognize that it has been abandoned for "a theory of jurisdiction based on practical necessity."

If genuine "practical necessity" is to determine jurisdiction over Panlibhon shipping, then plainly Liberia can have no objection to sharing authority with the NLRB in the matter of regulating labor relations aboard the *Nassau* and *Victoria*. Never having plied in Liberian trade or even touched Liberian waters, employing non-Liberian crews, and controlled by non-Liberian owners, the vessels' labor relations, if they are to be regulated at all during the cruise season, must, as a matter of "practical necessity," be deemed to fall within the ambit of Board jurisdiction. Aside from mailing Liberia a registration fee for which the right to fly the Liberian flag is purchased, all vital connections of the vessels are with other countries, and the

most important connections from the standpoint of actual operations are with the United States.

The Internal Order Rule Does Not Bar Assertion of Board Jurisdiction.

Ineres and the Republic of Liberia argue that application of the Labor Act to the *Nassau* and *Victoria* would affect the internal order of the vessels, and under "long standing principles of international law," internal order is subject to exclusive regulation by the flag state. In *West India* the Board concluded, and we agree, that internal order "is but a part of the broader flag law doctrine . . . ." If flag law does not foreclose Board jurisdiction, then the internal order rule which is but a segment of flag law, could not have that effect. This finds support in *Lauritzen* where internal order was included in the discussion of flag law generally.

But even if internal order is considered apart from overall flag law no different result is reached. The classic formulation of the internal order rule is found in *Wildenhus' Case*, 120 U. S. 1, 12 (1887), where it was described as reaching "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country or the tranquility of the port . . . ." (italics added). In *Urivac v. Jarka Co.*, 282 U. S. 234, 240 (1934) it was indicated that internal order embraces "discipline and private matters that do not interest the territorial power."

From this we see, as the Board pointed out in *West India*, that the internal order doctrine is limited to those events which affect only the internal affairs of a vessel. This plainly renders the doctrine inapplicable to this case. Here we are dealing with two major ocean liners that have a substantial and continuing connection with the commerce

of this nation, and whose owners through their anti-union policies engendered considerable industrial strife and public turmoil which spilled over from the vessels onto the docks and port facilities of the City of New York.

Apart from these considerations, the Board correctly held in *West India* that application of the Act to seaborn commerce, does not involve any interference with the internal order of a vessel. To begin with, the internal order doctrine was "developed and acquired its meaning more than a hundred years ago—that is, at a time when the rights and obligations created by the Act were unknown at law" (130 NLRB at 357).

Moreover, as the Board has observed, assertion of jurisdiction will not in actual effect interfere in any way with the internal order and discipline aboard the vessels. Ingres would, of course, be obligated to bargain with IMWU under the Labor Act. But the Act does not require the inclusion of any specific terms in an agreement or the reaching of any specific agreement at all so long as there is bargaining in good faith. As this Court pointed out in *NLRB* v. *Insurance Agents International Union*, 361 U. S. 477, 488 (1960):

> "Congress (in enacting the Labor Act) intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

The Act in other words encourages private collective bargaining and any agreement reached would be the private agreement of the parties, and the internal order doctrine has no application to private action. The crewmembers of the *Nassau* and *Victoria* presently work under the terms of private individual agreements (Defs. Ex. C, R. 245). Certainly a private collective bargaining agreement would

not constitute interference with the internal order of the vessels—or at least not the type which the doctrine was classically or practically designed to prevent.

The lower court cases of *Evangelinos* v. *Andreavapor Cia Nav., S. A.*, 162 F. Supp. 520, 521-2 (S. D. N. Y. 1958); *Grievas* v. *Alianza Compania Armadora, S. A.*, 150 F. Supp. 708 (S. D. N. Y. 1957), *mod.*, 276 F. 2d 822 (1960); and *McQuade* v. *Compania de Vapores San Antonio, S. A.*, 131 F. Supp. 365 (S. D. N. Y. 1955), cited by the Republic of Liberia in its brief, do not hold as an absolute rule that the law of the flag, to the exclusion of all others, governs employment relations aboard a vessel. These cases involved suits by individual seamen against the owners of vessels on which they had been employed for earned wages or wage supplements and dealt with the problem of the choice of applicable law. The cases unquestionably recognize that the parties may by contract agree to substitute the law of another nation for the law of the flag; and if private persons may do this, then Congress certainly may do it, particularly for vessels engaged in the commerce of this nation.

Even more important is *Grievas* v. *Alianza Compania Armadora, S. A.*, *supra*, the Second Circuit expressed impatience with the concept that flag law governs all and observed that where a vessel has "meaningful" relations with a nation other than the flag nation, the courts would be justified in applying the law of that other nation (276 F. 2d at 825):

> "We do not here decide that occasions might not arise where some law having a more meaningful relation than the law of a 'nominal foreign registration' ought not to be chosen even when the choice is between two foreign laws rather than, as in the Jones Act cases, between a foreign law and our own."

Board Jurisdiction Will Not Interfere with Enforcement of Liberia's Laws.

The inferences are large in the briefs of Incres and the Republic of Liberia that assertion of Board jurisdiction will interfere with enforcement of Liberia's laws. Incres, significantly, made no attempt to plead or prove Liberian law at the trial. Nevertheless, the Republic of Liberia contends in its brief (at p. 7) that Liberia regulates and controls "all matters of employment . . . in relation to the internal management of Liberian vessels.". The old sections of Title 22 of the Liberian Code of Laws of 1956 cited in support of this contention (all of which were amended or repealed several years ago) flatly contradict it (Cumulative Supplement to Liberian Code of Laws of 1956, published by the Cornell Univ. Press (1960)). For these provisions are limited to events taking place in Liberia or on vessels in Liberian waters; and the design of the Code generally is to concern itself with seamen shipping from a Liberian port. Thus these sections deal with failure of a crewmember to report to a ship "in Liberia" (§312, now §203 of Title 19); absences from a vessel without leave "while in Liberia" (§313, now §204 of Title 19); harboring of deserters "in Liberia" (§314, now repealed); "determination of seaworthiness" of "any vessel in Liberia" (§315, now repealed); crew rosters for clearance of vessels ". . . in Liberia bound on a foreign voyage" (§316, now §205 of Title 19). Section 369 of Title 22, also cited by the Republic of Liberia; is non-existent.

Curiously, those sections of Title 22 of the Code which *are* applicable to foreign-owned Liberian flag ships are not cited by the Republic of Liberia. They deal with such things as registration fees and fines for violations of prescribed markings and letter sizes and clearly indicate that the main concern of Liberia's laws is with revenue from

foreign flag shipping (§§53, 54, 75). Free transfer from or to Liberian registry is permitted at any time and any place (§69).

Most significantly, Section 30 of Title 22 adopts "the non-statutory general Maritime Law of the United States" as the general maritime law of Liberia; and Section 33 provides that courts of other countries may exercise jurisdiction over actions arising under the code.

The Treaty of Friendship between the United States and the Republic of Liberia Does Not Bar Assertion of Board Jurisdiction.

Incres and the Republic of Liberia, careful to cite only a single paragraph, i.e., Article XV, of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, 54 Stat. 1739, T. S. No. 956 (1938), would have the Court read the treaty as embodying a form of "yellow-dog" compact immunizing Liberian flag shipping from the jurisdiction of the Board and the organizational activities of American maritime unions generally. However, the treaty, far from presenting obstacles to Board jurisdiction, actually authorizes it. Article XV sets forth the unchallenged truism that a vessel's flag determines its nationality. However, as we have shown (*supra*, pp. 42-45), and the Board held in *West India*, alien status is no obstacle to application of the Act.

The remainder of the treaty codifies a civilized program for co-existence of friendly nations "responsive to the spiritual, cultural, economic and commercial aspirations" of the nationals of each state. To this end, the treaty provides that nationals of one of the "contracting" countries, when in the territorial jurisdiction of the other shall enjoy specified rights and privileges. At best,

these rights and privileges are equal to those enjoyed by resident nationals. At least, they are equal to those enjoyed by the nationals of the most favored nation.

This means that Incres, granting it to be a full-fledged Liberian national, when engaged in the commerce of this nation, enjoys no higher prerogatives, no more exalted status than American ship operators. Incres is subject to the same obligations under the LMRA and the same free play of private economic forces in the American economy—including the organizing activities of American maritime unions. Federal District Judge Frederick van Pelt Bryan, in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 460, n. 1 (S. D. N. Y. 1959), cited with approval by this Court in *Marine Cooks* (362 U. S. at 365), recognized the inapplicability of the treaty:

> "At the outset it should be noted that the Treaty between the United States and the Republic of Liberia which is relied on by the Liberian plaintiffs does not confer upon them or upon their vessels any greater rights than those of American corporations or vessels. It goes no further than to place them on a parity with American corporations and vessels in the respects enumerated by the Treaty."

Article X of the Consular Convention between the United States and Liberia Does Not Bar Assertion of Board Jurisdiction.

The Republic of Liberia has appended Article X of the consular convention with the United States to its brief and argues in effect that the convention should be applied to oust the Board of jurisdiction over Liberian flag shipping. But the convention by its own terms permits no such result. To begin with, the convention provides:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order

> of private vessels of his country and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and persons charged with wrongdoing shall have entered a port within his consular district."

The reasons we discussed against acceptance generally of the internal order doctrine as precluding Board jurisdiction (*supra*, pp. 45-47) apply here against acceptance of the doctrine through the medium of the convention.

Significantly, however, the convention itself recognizes the difference between internal order and discipline, on the one hand, and disputes relating to wages and wage contracts, on the other. For the convention provides in plain language that the consular officer shall not have exclusive jurisdiction over wage matters and wage contracts but shall enjoy only concurrent jurisdiction with "local authorities." Thus the convention further provides:

> "Such (a consular) officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws."

Obviously, therefore, a vessel's internal order does not encompass wages or contracts relating thereto, and jurisdiction of "local authorities" over these matters, including undoubtedly the NLRB, is confirmed.

POINT IV.

Board jurisdiction will assure a uniform federal maritime labor policy for foreign flag shipping and other beneficial results.

Only through the processes of the Board can a uniform peaceful solution be achieved to the labor problems of flag of convenience shipping. If access to the Board is denied American maritime unions, they will be compelled to resort to self-help measures in the form of strikes and picketing to alleviate the crippling competition of such shipping.

The operators of convenience vessels will doubtless seek injunctions against such activities in state courts. Both Incres and the Republic of Liberia assert that New York courts have jurisdiction over this controversy. They ignore the federal courts because they have been told in *Marine Cooks* and *Afran* that the Norris-LaGuardia Act has taken the federal courts out of the injunction business in labor disputes. If Incres and the Republic of Liberia are correct about state court jurisdiction, then the courts of every coastal state in the nation will have unrestrained authority to shape their own individual solutions to the problem.

The result is bound to be a multiplicity of disparate and conflicting decisions that will place a premium on forum shopping. This will make a shambles of the firmly embedded principle of uniformity and consistency in administration of federal maritime law. *Southern Pacific Co.* v. *Jenson*, 244 U. S. 205, 215-17 (1917); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953). Incres acknowledges this problem in its brief and suggests that "if for any reason any undesirable diversity of local law should result, it is for Congress to determine what, if any, remedy should be pro-

vided as a matter of national policy." We submit that Congress has already determined as a matter of national policy to eliminate undesirable diversity by NLRB regulation.

In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court recently stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy."

These words are peculiarly apt here. For plainly, if there is to be peace on the waterfront and the full and unobstructed flow of commerce which is the objective of the Act, then the task of regulating and disciplining the organizational activities of maritime unions in the foreign flag field must be entrusted to the Board. Only by unitary federal control will it be possible to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" *Garner* v. *Teamsters Union*, 346 U. S. 485, 490 (1955).

The claim that state courts have jurisdiction of this controversy should be seen for what it is—an attempt to gain complete immunity for Panlibhon shipping from the organizing activities of American maritime unions. Ineres and the *amicus* countries obviously expect that state courts will equate a finding of lack of Board jurisdiction with illegality of union conduct, otherwise state court jurisdiction would not be so attractive to them.